STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2007
v	No. 267398 Wayne Circuit Court
DONNA JEAN ALTOONIAN, Defendant-Appellant.	LC No. 02-005415-01

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

A jury convicted defendant Donna Altoonian of two counts of first-degree premeditated murder[1] and one count of possession of a firearm during the commission of a felony.[2] The trial court sentenced Altoonian to concurrent terms of life imprisonment for the murder convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. She appeals as of right. We affirm.

I. Basic Facts And Procedural History

A. Overview

Altoonian's convictions arise from the November 2001 shooting deaths of her two children. Altoonian and her identical twin four-year-old sons lived with her father, Don Altoonian, in Dearborn, Michigan. On November 14, 2001, Don Altoonian returned from an out-of-state business trip and expected Altoonian to meet him at the airport. Because Altoonian was not at the airport and did not answer the telephone, Don Altoonian took a taxicab home, arriving at approximately 5:30 p.m. Altoonian's vehicle was in the driveway, and the house was locked, but the mailbox was full.

Don Altoonian went inside and discovered Altoonian lying on the floor of the bedroom that she shared with her two children. There was a bunk bed in the corner of the small bedroom.

[1] MCL 750.316(1)(a).

[2] MCL 750.227b.

Altoonian was lying on the floor, with her back against the bed. Altoonian suffered from Meniere's disease, a congenital ear imbalance resulting in vertigo, so Don Altoonian assumed that she had an attack. He asked Altoonian where the children were, and she said that she did not know. He turned on the light and opened the curtains; at that point, he saw one of the children in the lower bunk of the bunk bed. The child was cold and apparently dead. Don Altoonian then called the police. Don Altoonian did not realize that Altoonian was injured until emergency personnel told him that she had been shot. There were no signs of forced entry or theft.

One of the twins was found on the left side of the bed, with a pillow over his face. He was shot twice in the upper body, roughly front to back. The other twin was found on the right side of the bed. He was shot twice in the back, back to front, and once in the right arm. The boys' wounds were inflicted from close range. In addition, Altoonian had been shot in the neck.

In January 2002, Altoonian was found incompetent to stand trial. She was hospitalized and received treatment. In July 2003, Altoonian was declared competent to stand trial. Altoonian was thereafter tried in October 2003.

B. Ballistics

The investigating officer, Dearborn Police Sergeant Karen Wisniewski, testified on behalf of the prosecution. Sergeant Wisniewski testified that a bullet casing was found under a pillow on the left side of the bed. There were two holes in the plaster wall, just below the mattress and two spent bullets on the carpeting, directly under the holes. There was one hole in the sheet and the mattress pad next to one of the strike marks, but no damage to the mattress next to the other. The appearance of the strike marks, that is, clean margins at the top and more damaged margins at the bottom, indicated that the bullet was traveling downward when it struck the wall. The marks were consistent with the shots being fired from the center of the bed.

On the right side of the bed, there were holes in the sheet and in the top and the right side of the mattress and a strike mark on the inside of the right rail. A spent bullet was found at that location, stuck on the bed rail and the sheets. A second spent bullet was found on the floor, under the front right side of the bed. These marks were consistent with a weapon being fired from the center of the bed, outward. Casings are ejected up and out, and usually remain near where the weapon was fired. Sergeant Wisniewski opined that if a person were shooting from outside the bed, the casings would likely be on the floor. In this case, there were several casings found on the bed.

There was a hole and powder marks in one of the pillows. An examiner from the Michigan State Police firearms identification unit testified that the hole and powder marks in the pillow indicated that a gun was fired from close range. A spent bullet was found inside another pillow.

Sergeant Wisniewski further testified that a hole was found in the center of the mattress, in the middle of a bloodstain, through the sheet and the mattress pad, and a bullet was found loose inside the mattress. The alignment of the holes was consistent with a weapon being discharged directly downward. DNA testing revealed that Altoonian's blood matched the blood found in the center of the bed.

Altoonian's 45-millimeter Colt, semi-automatic handgun was found wedged between the bottom bunk bed mattress and the left wall, on top of a cold air return. The gun case was found at the foot of the bed, on the floor. A box of ammunition was found under the bed, approximately a foot from the gun case. All the bullets and spent casings found at the scene were fired by Altoonian's weapon. There were no fingerprints found on the weapon.

Altoonian's gun uses a cartridge that is loaded with bullets and inserted into the magazine. As it is a semi-automatic, it ejects cartridges to the right after each shot. There was no ammunition in Altoonian's gun, but there was a spent casing that failed to eject, jammed in the slide. A firearms expert testified that if a weapon were fired with a weak or improper grip, there would not be enough pressure exerted on the slide, and the casing will not eject properly, as was seen on Altoonian's gun.

There was no gunshot residue found around the wound holes of Altoonian's sweatshirt, but the sweatshirt was not tested for gun residue on the wrist cuffs, where the hands would be. Altoonian was not tested for gun residue because she not initially considered a suspect. Further, the fact that the sweatshirt was bloody could have resulted in a false positive.

The officer in charge of the case concluded from all the evidence that the shooter had to have been in the bed, between the two children.

Former state police trooper David Balash testified for the defense as an expert in the areas of firearm identification, bullet trajectory, crime scene analysis, and blood spatter analysis. Balash believed that if the shooter had been in the bed with the children there would be a concentration of spent casings and gunpowder residue in that area, and there was neither. Balash believed that the position of the casings indicated that the gun was fired from the foot of the bed or from the open right hand side.

Balash believed that there was no hole in the center of the mattress, contrary to the police reports. Instead, he indicated that a bullet had ricocheted off the wall and into the mattress. However, he later conceded that he did not know that spent bullets were found on the floor under each of the wall strike marks. He then agreed that there was a slit in the center of the mattress, but maintained that it was not made by a bullet. He testified that there were no holes in the sheets at the center of the bed, but conceded there were tears at that location that may have been caused by a bullet, including some on the mattress pad.

Balash believed that bullets being fired perpendicular to the wall made the marks on the walls. He later conceded, however, that to hit the wall perpendicularly, the bullet would have had to go through the mattress, but there was no hole in the mattress at that location.

Balash believed that a bullet traveling downward, at a 45-degree angle made the mark on the right side rail. However, he later agreed that, to create the angle he identified on the right side rail, the shooter would have had to shoot through the dust ruffle at the foot of the bed "or you would have to be on the bed."

C. The Handwritten Notes

After the incident, while Altoonian was still hospitalized, Shelly Taylor went to the Altoonian home to help pack up the boys' belongings. Taylor and Altoonian had an on-and-off intimate relationship for 10 or 12 years, and lived together for three or four years.

In the attic, Taylor found two notes handwritten by Altoonian. Taylor turned the notes over to Don Altoonian, who gave them to the police. The two notes were found together and, therefore, the prosecutor theorized that they were written at about the same time. One of the notes, a multipage list, referred to Altoonian's broken taillight, which Don Altoonian stated had been broken for no more than six or seven months. The other note, a sort of poem, stated:

> If this is the life I was born to lead, why did you allow me to live, let alone breed. Now I am responsible for 2 more lives. You have made me stay no matter what ~~foreth~~ [sic] for me lies.
>
> I no longer have an easy way out, there are too many people depending on me for me to cop out. Why did you not let me die, while I lie in utereto [sic], upside down. When I lay on the table and walk to the light, why did you drag me back to this place? Nothing has changed, yet all is different, all new set of challenges, some quite significant.
>
> I beg of you, my Lady, to take me out of all this heat, to a place that is shady. I only wish to depart this life, and bring with me my children, for that is all the good I've done.

Don Altoonian did not know when this poem was written and noted that Altoonian tended to keep things for a long time.

D. Altoonian's Depression and Thoughts of Suicide

Dean Erickson, Altoonian's former boyfriend, testified that a year before the killings, Altoonian was depressed and wrote a suicide note, which he found in the garbage. Jerry Dyer, Altoonian's ex-husband, testified that she used to talk about killing herself as an attention ploy and once told him that her life would probably be better without the children. Ronald Stanis, a suitor of Altoonian, testified that, one to three months before the killings, she told him that she was depressed and in financial trouble, and was thinking of killing herself and the children. Taylor confirmed that Stanis relayed this conversation to her. Another former boyfriend, Michael Florn, testified that Altoonian had recently told him that she was a lousy mother, that the children would probably be better off without her, and that she had considered putting them up for adoption and killing herself.

Altoonian had surgery in November 2001, and had not been able to work since then. Because she could not work, she was not able to pay her bills, including her car payment and car insurance. She was depressed over the surgery and her finances. She was afraid to drive to get food stamps or take the children to preschool because she was afraid her car would be repossessed. She was receiving approximately $575 in monthly Social Security benefits because of her Meniere's disease, but no child support.

Altoonian told her sister, Bonnie Pawlowski, that she was depressed about her surgery and wished she were dead. She also said that her body looked "hideous." According to Pawlowski, Altoonian wished that the doctor had given her more pain medication, so she could take it all at once. Altoonian had attempted to kill herself with a gun in 1994.

Defendant's mother, Joyce Gascoyne, testified that Altoonian had discussed killing herself a couple of times, including in September 2001, and was considering entering a psychiatric program. In October 2001, Altoonian asked her mother for $4,500 for an elective surgery, but Gascoyne refused.

Rachel Redmond testified that she and Altoonian had an on-and-off intimate relationship from 1983 until about 1991, had lived together twice, for several months at a time, but that she had not seen Altoonian in approximately nine years. Redmond introduced Altoonian to Taylor, but Altoonian was "very violent with [Taylor]," so Redmond "wrote her off as a friend."

In 1991, Altoonian took Taylor's father shotgun, locked herself in a room, and said that she was going to kill herself. Taylor broke into the room and Altoonian had the shotgun to her stomach, but the safety was on and they took the gun away. Altoonian threatened to harm herself more than ten times during the time Redmond knew her. She took pills at least twice, cut her wrist once, and threatened to jump into traffic another time.

Taylor confirmed that Altoonian tried to shoot herself with Taylor's father's shotgun. On another occasion, according to Taylor, Altoonian was very upset because she had a fight with a boyfriend and locked herself in a room, fired a gun, and shot a hole in the wall. She also talked about committing suicide at other times.

E. Altoonian's Injuries and Competence

Altoonian was shot in the left upper chest, at approximately the base of the neck, and the bullet exited on the left upper back. Vascular surgeon Dr. Michael Israel testified that when he saw Altoonian, she was unable to speak and was paralyzed on the right side, which indicated that she had a stroke to the left side of the brain. The left carotid artery was almost completely severed, and a clot had formed, preventing the flow of blood to the brain, but if the clot released, she would quickly bleed to death. The carotid artery was repaired, and the flow of blood to the brain was reestablished. Her ability to speak and her motor functions then improved, but only to approximately 50 percent, by the time of discharge. Dr. Israel believed there was evidence of close range firing in the entrance wound by the neck. He believed that Altoonian was injured several hours before she was found, perhaps as long as 24 hours, but was not certain.

When the police interviewed Altoonian in early January 2002, she did not have any problems speaking and asking for an attorney. She told the police that her ex-husband Dyer had shot her and the children. She later changed her mind and told the police that Dyer was not the shooter; rather, a stranger came to the house and shot them.

Pawlowski visited Altoonian at the hospital and asked her if Dyer was responsible and Altoonian became agitated and shook her head affirmatively. She initially told Pawlowski that she did not know who did this, she later blamed Erickson, and then later stated that the father of the children, Jimmy Bunch, paid Dyer to shoot them. Pawlowski also visited Altoonian at the

jail, and Altoonian made her open her purse and show that she did not have a tape recorder inside. Altoonian also told her father that maybe Erickson was the shooter.

Taylor testified that, after the shooting, Altoonian had problems speaking and remembering words. She also had difficulty expressing herself. Taylor questioned Altoonian about the shooting and made notes of Altoonian's responses. Taylor eventually turned over her notes to the police.

Altoonian was reluctant to speak about the killings in front of others. She asked Taylor whether she (Altoonian) had killed the children. Altoonian told Taylor that a man had committed the crime with her gun, but did not name anyone and could not describe him. She also told Taylor that she was sorry. Altoonian wanted to know whether her family and the police thought that she did it. She also complained that everyone cared about the children and no one cared about her. Altoonian told Taylor that she had "tried," and that she should be dead.

In late January 2002, the trial court ordered a diagnostic evaluation of Altoonian. After two interviews, the trial court's clinical psychologist opined that, although Altoonian had difficulty expressing herself, she was competent to stand trial.

In October 2002, Altoonian moved for a competency hearing, and Altoonian was referred for a forensic evaluation, including extensive neuropsychiatric tests and interviews. Forensic psychologist Donna Kelland, Ph.D., concluded that Altoonian suffered from "marked expressive language difficulties and memory problems" and was functioning in the "borderline range of intelligence." Defendant's expressive language difficulties included not only "impaired fluency but also difficulties in comprehension." "Memory testing revealed severe verbal learning and memory difficulties characterized by encoding/storage deficits and marked confabulatory tendencies." Defendant's nonverbal memory and reasoning skills were stronger. Kelland found no "compelling indication" that defendant's symptoms were feigned or exaggerated.

Psychologist Lois Wightman, Ph.D., also evaluated Altoonian's competence to stand trial and conducted neuropsychological testing. According to Wightman, Altoonian's intelligence quotient was borderline, that is, below average, whereas at age 15, it was in the superior range. Altoonian suffered from a type of aphasia, that is, difficulty in choosing the right words to express herself. Her reports of the shooting were variable and lacking in detail. She also exhibited memory deficits, difficulty paying attention and recalling information, and a tendency to confabulate. Wightman explained that "confabulation" sometimes occurs in amnesic disorders and is the filling-in of information, such as giving answers to questions that are not truly recalled due to the memory impairment. Wightman clarified that confabulation is not a conscious attempt to be deceiving; it is a tendency to fill in information as if it were a memory without recognition that it is not a memory. According to Wightman, the false memory need not have an outside source, such as a suggestion by someone. According to Wightman, memory deficits and confabulation are not uncommon in stroke patients. Wightman opined that Altoonian was incompetent to stand trial. Wightman stated that although Altoonian "appeared capable of understanding the nature and object of the proceedings against her, she did not appear capable of assisting in her defense i[n] a rational manner due to her current mental condition." According to Wightman, Altoonian's memory difficulties "would make it difficult for her to follow trial proceedings, evaluate testimony, and provide information relevant to her defense." The trial

court found that Altoonian was incompetent to stand trial and committed her to the Center for Forensic Psychiatry for treatment.

In July 2003, the Center's unit coordinator, Sandra Brown-Bingham, recommended that Altoonian be found competent to stand trial. According to Brown-Bingham, Altoonian had completed the recommended courses of treatment in physical medicine, physical therapy, and occupational therapy. She was able to express herself appropriately, although she continued to have "some minor impairment speech delays and word finding." Brown-Bingham believed that Altoonian's "ability to converse with her attorneys is intact" and that Altoonian was "highly motivated to continue with the court process and is prepared to engage in the proceeding to the best of her abilities." Brown-Bingham stated that Altoonian had a good relationship with her attorneys, that she was "able to report a consistent version of what she recalls occurred on the date of the incident," but that she "continues to display amnesia regarding the specific events surrounding the actual crime." Altoonian understood the nature and object of the proceedings against her, "demonstrated the ability to assist rationally in her own defense," and "expressed a willingness to work with her attorney." Following a July 31, 2003 hearing, the trial court found Altoonian competent to stand trial.

Altoonian moved for reconsideration, raising amnesia as a basis for incompetency. The trial court ruled that although amnesia was a factor to be considered in making a determination of competency, the focus was on Altoonian's ability to understand the proceedings against her and assist in her own defense. The trial court was not persuaded that Altoonian was incompetent to stand trial.

Altoonian was convicted in October 2003, and Altoonian moved for a post-trial competency hearing. The trial court was not convinced that Altoonian's memory loss was so severe that she could not assist her attorneys in her defense. Further, the trial court found that the evidence against Altoonian, although circumstantial, was overwhelming, and did not at all support the defense theory that someone else was present in the bedroom and committed the crime. Thus, the trial court denied the motion for a post-trial competency evaluation.

II. Competency

A. Standard Of Review

Altoonian argues that the trial court erred in finding that she was competent to stand trial, and in declining to order additional competency evaluations or conduct a new evidentiary hearing on the issue of competency, either before jury voir dire or at sentencing. "A determination of competence is within the discretion of the trial court."[3] An abuse of discretion occurs only when the trial court's decision falls outside the range of reasonable and principled outcomes.[4]

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[3] *People v Ritsema*, 105 Mich App 602, 606; 307 NW2d 380 (1981).

[4] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

B. Transcript

Initially, we note that Altoonian failed to provide a transcript of the July 31, 2003 hearing at which the trial court determined that she was competent to stand trial. In response to a request by this Court, Altoonian submitted an affidavit from the court reporter indicating that the notes for this hearing could not be located and, therefore, a transcript would not be filed. However, Altoonian has not satisfied the procedure prescribed in MCR 7.210(B)(2) for filing a settled statement of facts to serve as a substitute for the transcript. Accordingly, there is no direct basis for this Court to conclude that the trial court's ruling was erroneous, and this issue should be deemed abandoned.[5]

C. Evaluating Competence

Nevertheless, despite the absence of the competency hearing transcript, based on the available record, we cannot conclude that the trial court abused its discretion in declaring Altoonian competent to stand trial.

"When a defendant's competency to stand trial is questioned, a competency examination is given to determine his mental state at the time of trial to assure that he understands the charges against him and can knowingly assist in his defense."[6] The Mental Health Code contains a procedure for assessing a defendant's competence to stand trial. In particular, MCL 300.2020(1) states:

> A defendant to a criminal charge *shall be presumed competent* to stand trial. *He shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner.* The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial.

The test of competence is whether the defendant "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'"[7] The question of a defendant's competence is ongoing.[8] Because a defendant is presumed to be competent, at every

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[5] *People v Johnson*, 173 Mich App 706, 707; 434 NW2d 218 (1988).

[6] *People v Wright*, 431 Mich 282, 285-286; 430 NW2d 133 (1988).

[7] *People v Stolze*, 100 Mich App 511, 514; 299 NW2d 61 (1980), quoting *Dusky v United States*, 362 US 402, 402; 80 S Ct 788; 4 L Ed 2d 824 (1960).

[8] *People v Matheson*, 70 Mich App 172, 184; 245 NW2d 551 (1976).

competency hearing the defendant must again persuade the court to redetermine that he or she is incompetent, or "trial shall commence as soon as practicable."[9]

Altoonian was initially declared incompetent to stand trial in January 2003, and referred for treatment. An updated report, dated July 2003, indicated that Altoonian had completed recommended courses of treatment. She was able to express herself appropriately, understood the nature and object of the proceedings against her, demonstrated the ability to assist rationally in her own defense, and expressed a willingness to work with her attorney. There is no indication in the available record that Altoonian presented any evidence or witnesses at the July 31, 2003 hearing to counter the prosecutor's showing that she was then competent to stand trial.

Altoonian argued that the brain injury that she suffered during the crime affected her memory and ability to recall the events surrounding the crime. But a defendant's amnesia concerning the crime is not automatically grounds for a finding of incompetence to stand trial.[10] Further, where the evidence is overwhelming, such that the defendant's memory of the events would have been of questionable assistance, and the defendant otherwise has the present ability to consult with and assist her attorney, the defendant's amnesia concerning the crime will not be found to result in serious prejudice, and does not render her incompetent to stand trial.[11] Here, as noted by the trial court at sentencing, the prosecutor's case was very strong, such that Altoonian's memory was of questionable assistance in her defense, and Altoonian had the present ability to consult with and assist her attorney.

Additionally, Altoonian failed to come forward with any new evidence of incompetence at the time of trial or at sentencing. Therefore, we conclude that the trial court did not abuse its discretion in reaffirming its pretrial finding, and in declining to order a post-trial competency hearing.

III. Opinion Evidence

A. Standard Of Review

Altoonian argues that she was denied a fair trial because the investigating officer, Dearborn Police Sergeant Karen Wisniewski, was allowed to offer her opinion of bullet trajectories and perceived bullet strike marks without being qualified as an expert and without a foundation showing that she was qualified as an expert to testify in these areas. A trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion.[12] In this case, however, Altoonian did not timely object to the officer's testimony. Rather, she only objected to an exhibit demonstrating the officer's opinion, which exhibit she does not challenge

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[9] See MCL 330.1040(3); see also *Matheson*, *supra* at 184.

[10] *Stolze*, *supra* at 514-515.

[11] *Id*. at 515-516.

[12] *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

on appeal. Therefore, this issue is unpreserved. Unpreserved issues are forfeited absent a showing of plain error affecting the defendant's substantial rights.[13]

B. MRE 701 And 702

MRE 701, concerning lay opinion testimony, provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those *opinions or inferences* which are (a) *rationally based on the perception of the witness* and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. [Emphasis added.]

Conversely, MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, *experience*, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. [Emphasis added.]

Police officers can sometimes testify as lay witnesses.[14] Conversely, testimony based on a police officer's *perceptions and experience* can sometimes be considered expert testimony, subject to MRE 702.[15]

In *Dobek*, the Court identified an apparent conflict between *Chastain v Gen Motors Corp* (*On Remand*),[16] and *Co-Jo, Inc v Strand*.[17] In *Chastain*, this Court held that an officer was properly permitted to testify, based on his observations at the scene, that the plaintiff was not wearing a seatbelt at the time of an auto accident.[18] The Court noted that, while the witness's testimony was consistent with his conclusions in other cases, it was not based on his past experience.[19] Conversely, in *Co-Jo*, a firefighter was permitted to compare the speed of a fire to

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[13] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[14] See *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 454-456; 540 NW2d 696 (1995) (police officers were properly allowed to testify concerning the skid marks they saw on the pavement after an accident).

[15] See *People v Dobek*, 274 Mich App 58, 77-78; ___ NW2d ___ (2007).

[16] *Chastain v Gen Motors Corp* (*On Remand*), 254 Mich App 576; 657 NW2d 804 (2002).

[17] *Co-Jo, Inc v Strand*, 226 Mich App 108; 572 NW2d 251 (1997).

[18] *Chastain*, *supra* at 585-590.

[19] *Id*.

the speed of other fires he had seen, based on his observations at the scene *and* "his extensive experience in observing other building fires and investigating their causes."[20]

MRE 701 appears to recognize that a witness's experience may color the inferences and opinions the witness will draw from the facts perceived. On the other hand, MRE 702 focuses on the need for "scientific, technical, or other specialized knowledge." Nonetheless, as the Court noted in *Dobek*, the line between the two rules is not always clear.

C. Applying The Standards

Here, Sergeant Wisniewski sketched and photographed the crime scene and collected evidence. She testified concerning the appearance of bullet strike marks on the wall and the inside of the right bed rail. She then testified concerning the inferences that she drew from her observations, based on her experience. Although other laypersons viewing the same strike marks might not be able to ascertain the direction of the bullets that caused them (or even that marks were caused by bullets), Sergeant Wisniewski's testimony was based on her perceptions, not on her "scientific, technical, or other specialized knowledge." Because Sergeant Wisniewski's testimony does not clearly fall outside the scope of MRE 701, we conclude that the trial court's admission of the testimony did not constitute plain error.

IV. Other Evidentiary Rulings

A. Standard Of Review

Altoonian argues that the trial court abused its discretion in admitting (1) undated, handwritten notes, (2) evidence of her financial condition, and (3) crime scene photographs. She argues that this evidence was both irrelevant and unduly prejudicial. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[21] Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.[22] We review for an abuse of discretion a trial court's decision to admit or exclude evidence.[23]

B. Altoonian's Handwritten Notes

It is undisputed that Altoonian wrote the notes at issue. Two witnesses familiar with Altoonian's handwriting identified the writing as hers. The poem refers to her low self-worth, her feelings of being overwhelmed by her responsibilities, and her "wish to depart this life, and bring with me my children, for that is all the good I've done." This evidence was relevant to

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[20] *Co-Jo*, *supra* at 116-117.

[21] MRE 401.

[22] MRE 403.

[23] *Smith*, *supra* at 550.

Altoonian's intent and state of mind. Altoonian argues that the notes were unduly prejudicial because they were undated and, therefore, failed to give accurate insight into her state of mind at the time of the offense, thereby misleading the jury. However, the fact that the notes were undated was made apparent to the jury. Although Altoonian suggests that the notes were authored "several years prior to the murders," the multi-page to-do list referred to her broken taillight, which her father stated had been broken for no more than six or seven months. Don Altoonian also stated that he did not know when the poem was written, but added that Altoonian tended to keep things for a long time. The poem referred to Altoonian's children, which indicates that it was written no more than four years earlier, given the ages of the children. Under the circumstances, the probative value of the notes was not substantially outweighed by the danger of unfair prejudice. We conclude that the trial court did not abuse its discretion in admitting the notes.

C. Altoonian's Financial Condition

Evidence of poor financial condition is not proof of guilt.[24] Such evidence "ordinarily has limited probative value and usually goes to a collateral issue, [and] will often distract rather than aid the jury."[25] Proof of poverty carries the danger of unfair prejudice, and its use should be carefully scrutinized.[26] It generally cannot be used to prove motive because it carries the risk that the jury will view the defendant simply as a bad person.[27] Nonetheless, such evidence may be admissible, depending on the circumstances of the particular case.[28]

Here, the prosecutor never used Altoonian's financial situation to support an inference that she was a bad person who had a propensity to commit crimes. Rather, the prosecutor's theory was that Altoonian's financial situation was the cause of her depression, which motivated her to commit this crime. Motive is always relevant to a murder charge, particularly where, as here, the proofs are circumstantial.[29] Altoonian has failed to show that the relevance of this evidence was substantially outweighed by the danger of unfair prejudice.

D. Crime Scene Photographs

Photographs of the crime scene and of the victims are relevant to the elements of the crime, such as premeditation and intent to kill, even where, as here, the defendant does not

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[24] *People v Henderson*, 408 Mich 56, 62; 289 NW2d 376 (1980).

[25] *Id.* at 65.

[26] *Id*. at 62-66.

[27] *Id*. at 66.

[28] *Id*. at 66, 68 (stating that evidence of a shortage of funds, combined with evidence that a defendant worked in a managerial position with access to the complainant's storeroom, was relevant to proving embezzlement).

[29] *People v Rice* (*On Remand*), 235 Mich App 429, 440; 597 NW2d 843 (1999).

dispute the cause or manner of death.[30] Such photographs are also relevant to illustrating expert testimony, and to the credibility of witnesses.[31] Concerning the potential for prejudice, photographs are more effective than oral descriptions and, therefore, are not excludable simply because a witness could testify to the information they contain.[32] Photographs that are otherwise admissible are not rendered inadmissible merely because they vividly illustrate gruesome or shocking details of a crime.[33] However, photographs whose sole purpose is to arouse the sympathies and prejudices of the jurors are properly excluded.[34]

Here, four photographs attached to Altoonian's brief were admitted as exhibits at trial.[35] We cannot disagree with the trial court that the photographs are not particularly gruesome. The photographs were used extensively by Sergeant Wisniewski to support her theories of the direction of the bullets and the location of the shooter. They were also used by other officers to illustrate the position of the bodies, and the location of the evidence found in the room. Thus, the photographs were relevant and probative to the prosecutor's theory and to the credibility of witnesses who testified concerning their observations of the scene. The prosecutor was not obligated to use less powerful means, such as black and white photographs, or to forego the photographs because the bedroom scene was recreated in the courtroom. Although the photographs were damaging to her, Altoonian has failed to show that they were unfairly prejudicial. We conclude that the trial court did not abuse its discretion in admitting them.

V. Sufficiency Of The Evidence

A. Standard Of Review

Altoonian argues that there was insufficient evidence to support her convictions for first-degree premeditated murder. The sufficiency of the evidence is evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt.[36] The resolution of credibility disputes is within the exclusive province of the trier of fact.[37]

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[30] *People v Mills*, 450 Mich 61, 68-71; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995).

[31] *Id*. at 69, 72-74, 76.

[32] *Id*. at 76-77.

[33] *Id*.

[34] *Id*. at 77.

[35] As noted by the prosecutor, a fifth photograph attached to Altoonian's brief was *not* used as an exhibit at trial.

[36] *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985).

[37] *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

B. Elements Of The Crime

"The elements of first-degree [premeditated] murder are that the defendant killed the victim and that the killing was . . . 'willful, deliberate, and premeditated,'"[38] "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or a problem."[39] Both "characterize a thought process undisturbed by hot blood."[40] "While the minimum length of time needed to exercise this process is incapable of exact determination, a sufficient interval between the initial thought and the ultimate action should be long enough to afford a reasonable [person] an opportunity to take a second look at his contemplated actions."[41]

C. Identification; Premeditation

Altoonian argues that there was insufficient evidence to identify her as the shooter and also insufficient evidence of premeditation. Premeditation may be inferred from all the facts and circumstances, including the relationship between the parties, the circumstances of the killing itself, and the defendant's conduct before and after the murder.[42] Premeditation can also be inferred from the type of weapon used and the location of the wounds.[43]

Here, the evidence showed that Altoonian told several people that she was depressed about her financial condition and was contemplating suicide. She told people that she was considering killing herself and her children. She wrote a note expressing the idea of killing herself and the children. Altoonian's gun was identified as the weapon used to shoot the children. Each child was shot at least twice and there was evidence that the shots were fired from close range.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to show premeditation and deliberation. Altoonian's identity as the perpetrator was further shown by the lack of any evidence suggesting that someone else was present inside the house when the crime was committed, and the presence of evidence indicating that the shots originated from the center of the bed, where her blood was found. Thus, we conclude that the evidence was sufficient to support Altoonian's convictions.

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[38] *People v Bowman,* 254 Mich App 142, 151; 656 NW2d 835 (2002).

[39] *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987).

[40] *Id*.

[41] *Id*.; see also *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

[42] *Anderson*, *supra* at 537; *Furman*, *supra* at 308.

[43] *People v Berry* (*On Remand*), 198 Mich App 123, 128; 497 NW2d 202 (1993).

VI. Prosecutorial Misconduct

A. Standard Of Review

Altoonian argues that the prosecutor's misconduct deprived her of a fair trial. Claims of prosecutorial misconduct are reviewed on a case-by-case basis and the challenged remarks are reviewed in context.[44] The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial.[45] Because Altoonian failed to object to the prosecutor's conduct, however, "appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice."[46] As with other unpreserved issues, a defendant must show a plain error affecting his substantial rights.[47]

B. Altoonian's Failure To Testify

Altoonian argues that the prosecutor improperly commented on her failure to testify. A prosecutor may not comment on a defendant's failure to testify or present evidence.[48] Here, the prosecutor did not violate this rule. Rather, the prosecutor advised the jury of Altoonian's right not to testify and that she had no burden of proof, and specifically asked the jury not to consider the fact that she did not testify. The trial court later instructed the jury to the same effect. We conclude that Altoonian has not demonstrated a plain error affecting her substantial rights on this point.

C. Altoonian's Poverty

Altoonian argues that the prosecutor improperly commented on her financial problems. As discussed previously, evidence of a defendant's poor financial situation generally cannot be used to prove guilt, and ordinarily has low probative value and high potential for prejudice.[49] Such evidence may be admissible, however, depending on the circumstances of the particular case.[50]

Here, the evidence showed that Altoonian's financial situation caused her severe depression, which led to thoughts of suicide and killing her children. The trial court ruled that

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[44] *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

[45] *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995).

[46] *Noble*, *supra* at 660; see also *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000), abrogated on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

[47] *Schutte*, *supra* at 720; see also *Carines*, *supra* at 763-764.

[48] *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995).

[49] *Henderson*, *supra* at 62-66.

[50] *Id*. at 66-68.

the prosecutor could introduce evidence of Altoonian's financial situation to show the circumstances that led to the killings. A finding of "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence."[51] Thus, we conclude that the prosecutor's conduct was not improper on this point.

D. Altoonian's Occupation and Surgery

Altoonian argues that the prosecutor improperly disclosed to the jury her former occupation and the nature of her surgery, contrary to the trial court's ruling. The trial court ruled that the prosecutor could not disclose to the jury the nature of Altoonian's occupation as a topless dancer or the nature of her recent surgery, a breast implant removal. The record discloses that the prosecutor did not violate the court's ruling. In fact, during closing argument, he asked the jury *not* to speculate concerning the nature of Altoonian's surgery. Nonetheless, the prosecutor argued, consistently with his theory of the case, that Altoonian was depressed about her surgery, was depressed about being unable to work, and became even more depressed when she did not receive some money that she expected, to have a second surgery. The prosecutor argued that these circumstances created an unfortunate confluence of events in Altoonian's life that motivated the killings. We conclude that the prosecutor's comments were not inconsistent with the trial court's ruling and did not constitute misconduct.

E. Altoonian's Lesbian Relationships

Altoonian argues that the prosecutor improperly disclosed Altoonian's lesbian relationships to the jury in an effort to arouse passion or prejudice. It is improper for a prosecutor to inject issues broader than a defendant's guilt or innocence.[52] Here, however, the nature of Altoonian's relationships with Taylor and Redmond was disclosed in a casual, nonsensationalistic manner, to lend credibility to the witnesses' testimony that they knew her well, had known her for a very long time, and knew that she had attempted to kill herself in the past. We conclude that Altoonian has failed to show that this information was either plain error or affected her substantial rights.

F. Altoonian's Expert

Altoonian argues that the prosecutor unfairly attacked her expert in an effort to deprive her of a fair trial. Unfounded personal attacks and ridicule can warrant reversal.[53] However, attacks that are based on the evidence are permissible, as is cross-examination designed to explore the expert's familiarity with the evidence or relevant scientific principles.[54] A prosecutor

[51] *Noble*, *supra* at 660.

[52] See *Rice*, *supra* at 438.

[53] *People v Tyson*, 423 Mich 357, 375-376; 377 NW2d 738 (1985).

[54] *People v Howard*, 226 Mich App 528, 545-546; 575 NW2d 16 (1997).

has wide latitude and may address the evidence and all possible inferences arising therefrom.[55] He need not make his arguments in the blandest possible terms.[56]

Here, the prosecutor referred to Altoonian's expert, David Balash, as "a bit of a hired gun." However, there is record support for the prosecutor's argument that Balash was very selective in his view of the evidence. The prosecutor was permitted to use the evidence to forcefully discredit Balash's expert opinions.

The prosecutor's reference to Balash as "super Dave" appears to have been made in response to defense counsel's tone and comments concerning witness Shelly Taylor acting as an "amateur sleuth." While somewhat disrespectful, "an otherwise improper remark may not rise to error requiring reversal when the prosecutor is responding to the defense counsel's argument."[57] Considered in context, we conclude that the prosecutor's conduct did not constitute plain error affecting Altoonian's substantial rights.

VII. Cumulative Error

Because Altoonian has failed to sustain any of her allegations of error, she has failed to show that the cumulative effect of multiple errors deprived her of a fair trial.[58]

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello

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[55] *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

[56] *Id*.

[57] *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001), quoting *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

[58] *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998); *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984).